

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

**Midwest Independent Transmission  
System Operator**

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**Docket No. ER02-108-007**

**COMMENTS OF THE  
ILLINOIS COMMERCE COMMISSION**

Pursuant to Rule 211 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.211, the Illinois Commerce Commission ("ICC") hereby submits its comments on the filing submitted by the Midwest ISO in Docket No. ER02-108-007 on July 1, 2002. The filing fails to comply with the directives of the Commission in a number of respects and should not be approved. In support thereof, the ICC states as follows:

**I. BACKGROUND**

On October 15, 2001, the Midwest ISO submitted a Market Monitoring Plan ("Market Monitoring Plan") intended to comply with the market monitoring requirements of Order 2000. On November 19, 2001, the ICC submitted comments to the Commission on the Market Monitoring Plan ("November 19 Comments") arguing that the developing institutional framework for market monitoring in the Midwest was flawed and that the specific Market Monitoring Plan submitted by the Midwest ISO required modification. On December 20, 2001, the Commission conditionally accepted the Midwest ISO's Market Monitoring Plan.<sup>1</sup> However, the Commission required the Midwest ISO to make compliance filings. On January 17, 2002, the Midwest ISO filed a Market Monitoring Contract ("Market Monitoring Contract") to comply

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<sup>1</sup> *Midwest Independent Transmission System Operator, Inc.*, 97 FERC ¶ 61,326 (2001) (*hereinafter*, "December 20 Order").

with the Commission's December 20 Order directives. On January 18, 2002, the ICC filed a request for rehearing of the Commission's December 20 Order arguing that the Commission erred to the extent that it accepted the Midwest ISO's originally filed Market Monitoring Plan. On January 28, 2002, the Midwest ISO filed a revised Market Monitoring Plan to comply with the Commission's December 20 Order directives. On February 7, 2002, the ICC filed Comments on the Market Monitoring Contract, arguing that the terms of the Market Monitoring Contract demonstrate the absence of independence between the Midwest ISO and the Market Monitor and urging the Commission to reject the Market Monitoring Contract. On February 20, 2002, the ICC filed comments on the Midwest ISO's revised Market Monitoring Plan compliance filing reiterating its original concerns with the Market Monitoring Plan that had not been addressed by the Commission.

On May 31, 2002, the Commission issued an order rejecting the Midwest ISO's Market Monitoring Contract ("May 31 Order") and directed the Midwest ISO to file a Revised Market Monitoring Contract and to modify the Market Monitoring Plan as set forth in the order.<sup>2</sup> On June 19, 2002, the ICC filed a request for rehearing of the May 31 Order, raising concerns about the independence of the Market Monitor from the Midwest ISO.

On July 1, 2002, the Midwest ISO submitted its filing to comply with the May 31 Order ("July 1 filing" or "compliance filing"). The compliance filing consists of the Revised Retention Agreement for Market Monitoring Services, which has been renegotiated by and between the Midwest ISO and Potomac Economics, Ltd. ("Revised Market Monitoring Contract") and revisions to Attachment S ("Revised Market Monitoring Plan"). The July 1 filing also contains revisions to the Market Monitoring Plan that go beyond the Commission's directives in the May

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<sup>2</sup> *Midwest Independent Transmission System Operator, Inc.*, 99 FERC ¶ 61,237 (2002) (*hereinafter*, "May 31 Order").

31 Order. On July 9, 2002, the Commission issued notice of the July 1 filing, setting July 22, 2002, as the comment date. The ICC herein comments on the Midwest ISO's July 1 compliance filing and those additional modifications to the Revised Market Monitoring Plan included therein. Given the ICC's procedural process for action approval, it was unable to meet the July 22 deadline for submitting comments. However, these comments contain information that should assist the Commission in understanding the issues in this proceeding and accepting the comments should not prejudice any party to this proceeding. Thus, the ICC requests that the Commission accept the ICC's comments two days late.

## **II. ICC POSITION AND RECOMMENDATION**

The Midwest ISO's July 1 filing fails to comply with the Commission's directive to disclose the overall budget for market monitoring or explain why it should not be disclosed. Specifically, the Commission's May 31 Order directed the Midwest ISO to either justify its "request [for] confidential treatment of the financial terms" when it files the revised Market Monitoring Contract pursuant to Part 388.112 of the Commission's regulations, or disclose the financial terms of the Contract.<sup>3</sup> The Midwest ISO did neither of these things. Accordingly, the Commission should not approve the July 1 filing, and should order the Midwest ISO to comply with the Commission's directives.

The Midwest ISO also failed to comply with the separate requirement in the Commission's May 31 Order to provide "interested parties" with an opportunity to review the "terms of payment" in order to satisfy themselves that "payment cannot result in inappropriate incentives to find in favor of the RTO."<sup>4</sup> There can be no more fundamental "term of payment" in the context of the Midwest ISO's Market Monitoring Contract than the overall market

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<sup>3</sup> May 31 Order, at p. 61,977, P.31.

<sup>4</sup> *Id.*, at P.33.

monitoring budget amount. The Midwest ISO has failed to comply with the Commission's directive that the "terms of payment" under the Contract be subject to review by "interested parties."

Furthermore, in order for this required review process to have meaning, it must take place prior to the beginning of the market monitoring contract period as the ICC explains below. Additionally, the review process must require the Midwest ISO to file the market monitoring budget with the Commission for evaluation and approval. Finally, the amounts spent by the Midwest ISO for the 2001-2002 market monitoring contract budget year must be thoroughly examined because the budget for Midwest market monitoring was established under a questionable procedure -- without stakeholder input or review. The ICC believes that these problems must be addressed before the Midwest ISO will be in compliance with the May 31 Order.

Accordingly, the ICC recommends that the Commission not accept the Midwest ISO's Revised Market Monitoring Contract. As the Commission ruled in the December 20 Order, the Commission and interested parties must be able to assure themselves that the Market Monitor is "truly independent,"

Without knowing the details of the contract we cannot be sure that the IMM [Independent Market Monitor] is truly independent of the RTO. For instance, since the IMM will be paid for its services pursuant to this contract, the Commission must be able to satisfy itself that the terms of payment cannot result in inappropriate incentives to find in favor of the RTO when reviewing the RTO's conduct, market rules, and procedures.<sup>5</sup>

The Midwest ISO should, once again, be directed to submit the "terms of payment" for review by "interested parties" as a minimum step on the way toward assuring "true independence" of the Market Monitor.

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<sup>5</sup> December 20 Order, at p. 62,518.

In addition, the Midwest ISO made a number of revisions to its Market Monitoring Plan. The only modification that the Commission's May 31 Order directed be made to the Market Monitoring Plan was to "modify the Market Monitoring Plan consistent with our directive in *New Power v. PJM*."<sup>6</sup> In response, the Midwest ISO added the following language to Section 4.3 of the Plan:

The IMM shall also notify the FERC immediately in the event the IMM identifies a significant market problem that may require (i) further investigation; (ii) a change in the Midwest ISO's tariffs or market rules; or (iii) action by the FERC and/or one or more state commissions.

This addition to the Market Monitoring Plan appears to comply with the Commission's directive and the ICC is not opposed to it.

However, the Midwest ISO went beyond the Commission's directive for modifying the Market Monitoring Plan. Indeed, the Midwest ISO included numerous changes to the Market Monitoring Plan. Many of the changes were cosmetic modifications to make the Revised Market Monitoring Plan accord with the language of the Revised Market Monitoring Contract. However, some of the proposed changes have substantive effect beyond the directives of the Commission and should be examined accordingly. For example, Section 1.1 of the Revised Market Monitoring Plan requires the Market Monitor to report directly to the Midwest ISO Board of Directors and Section 3.2 establishes a Market Monitoring Liaison Officer. In its July 1 filing, therefore, the Midwest ISO is in effect making a new proposal under Section 205 of the Federal Power Act. It is the Commission's policy not to allow parties to combine filings made in compliance with a prior Commission order with Section 205 filings.<sup>7</sup> The ICC believes, therefore, that the portion of the Midwest ISO's July 1 filing that goes beyond the Commission's

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<sup>6</sup> *Midwest Independent Transmission System Operator, Inc.*, 99 FERC ¶ 61,237 (2002), p. 61,977, at P. 34 citing, *New Power v. PJM*, 98 FERC ¶ 61,208 (2002) (*hereinafter*, "*New Power v. PJM*").

<sup>7</sup> *Calpine Eastern Corporation, et al.*, 97 FERC ¶ 61,078 (2001), at 61,382.

compliance order should be treated as a separate Section 205 filing.<sup>8</sup> Accordingly, the ICC will herein comment on the proposed modifications as they impact the entire Revised Market Monitor Plan as a whole.<sup>9</sup>

The ICC continues to believe that the plan is fundamentally flawed in that it fails to achieve independence of the Market Monitor from the Midwest ISO. As the ICC has explained in its previously filed comments, the ICC believes that the present market monitoring framework is flawed and that the Commission should modify it so that the Market Monitor is established as a contract agent of the Commission, rather than of the Midwest ISO. As long as the Market Monitor remains a contract agent of the Midwest ISO, it is unreasonable to expect it to be independent of the Midwest ISO. The ICC made specific recommendations in its November 19 Comments about how to redesign the framework for market monitoring in the Midwest and how to establish proper agency relationships so that incentives are properly aligned with the public interest and so that the Market Monitor can perform its responsibilities independently of influence by the Midwest ISO. The ICC reiterates its recommendations here. The Midwest ISO's July 1<sup>st</sup> modifications to the Plan establishing a Midwest ISO Market Monitoring Liaison Officer and requiring the Market Monitor to report directly to the Midwest ISO Board of Directors are illustrative of the flaws in the current market monitoring framework.

In addition, regardless of whether the Commission decides to adopt the ICC's recommended change to the overall framework for market monitoring in the Midwest, the ICC, again, recommends that the Commission modify specific, identified provisions in the Market

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<sup>8</sup> See *ISO New England, Inc.*, 96 FERC ¶ 61,361 (2001), at 62,360.

<sup>9</sup> The Commission requires that compliance filings contain only provisions that are designed to comply with the Commission's specific directives. See *ISO New England Inc.*, 61 FERC ¶ 61,016, at 61,060 (2000) ("Compliance filings must be limited to the specific directives in the Commission's order"); See also., *Sierra Pacific Power Company*, 80 FERC ¶ 61,376, at 62,271 (1997) ("The sole purpose of a compliance filing is to make the revisions directed by the Commission."); accord, *Delmarva Power & Light Company*, 63 FERC ¶ 61,321, at 63,160 (1993) ("the sole relevant issue in reviewing [a] compliance filing is whether it complies with the directions in the [order].").

Monitoring Plan to: (1) improve the independence of the market monitor under the existing framework; (2) accord state commissions with proper access to needed market monitor information; and (3) ensure that the Market Monitoring Plan is properly inclusive of the new transmission entities.

In sum, the ICC recommends that the Commission not approve the Midwest ISO's Revised Market Monitoring Plan and direct the modifications recommended by the ICC.

### **III. DISCUSSION**

#### **A. The Midwest ISO's Revised Market Monitoring Contract Does Not Comply with the Commission's May 31 Order**

##### **1. The Midwest ISO Must Disclose Financial Terms of the Revised Market Monitoring Contract or Explain Confidential Treatment**

The ICC supports the Commission's decision that the Midwest ISO must either make public the financial terms of the Revised Market Monitoring Contract or explain why confidential treatment is warranted. The Midwest ISO must also provide "interested parties" with an opportunity to review the "terms of payment" so that they may ensure that the Market Monitor can be truly independent of the Midwest ISO.

In its February 7 Comments, the ICC protested the Midwest ISO's decision to withhold information on the overall budget for market monitoring and the financial terms of the Market Monitoring Contract. The ICC argued that,

The redacted information regarding the financial terms of the Contract is precisely the type of information that will allow interested persons such as those who will ultimately pay for the costs of market monitoring in transmission rates as well as those who may suffer higher delivered power prices because of an inadequate market monitoring budget, to make an independent determination whether the market monitor will be independent of the MISO and whether the market monitor will have a sufficient budget (or an excessive budget) to perform meaningful market monitoring.<sup>10</sup>

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<sup>10</sup> ICC's February 7 Comments, at 5.

The ICC argued that transmission customers who will ultimately be called on to pay the costs of market monitoring, along with public interest representatives, should have an identified role in establishing the overall budget for market monitoring and should have an opportunity to advise the contracting parties on the financial terms of the market monitoring contract.

In the May 31 Order, the Commission also expressed concern with the budget and financial terms of the Midwest ISO's market monitoring contract. The Order stated,

the Commission finds that Applicants have not provided sufficient justification for confidential treatment of the financial terms of the Retention Agreement.<sup>11</sup>

and,

if Midwest ISO chooses to renew its request for confidential treatment of the financial terms when it files the revised Retention Agreement, we will require it to submit additional justification pursuant to Part 388.112 of the Commission's regulations.<sup>12</sup>

and,

The terms of any revised Retention Agreement should be integral to Midwest ISO's continued compliance with the Order No. 2000 requirements for this function because the Commission and interested parties will need to be able to review them in order to satisfy themselves that the terms of payment cannot result in inappropriate incentives to find in favor of the RTO when reviewing the RTO's conduct, market rules, and procedures.<sup>13</sup>

The Commission's Order gave the Midwest ISO the opportunity to request confidential treatment of the "financial terms" of the Contract if it provides justification for doing so pursuant to Part 388.112 of the Commission's regulations. However, the Commission's Order also stated that "interested parties" must be able to review the "terms of payment" in order to satisfy

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<sup>11</sup> May 31 Order, at p. 61,977, P. 31.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*, at P. 33. (Emphasis added).



themselves that “payment cannot result in inappropriate incentives to find in favor of the RTO.”<sup>14</sup>

There can be no more fundamental “term of payment” in the context of the Midwest ISO’s market monitoring contract than the overall market monitoring budget amount. As the ICC argued in its February 7 Comments, customers who will ultimately be called on to pay for market monitoring in their transmission service rates should have a role in establishing the overall market monitoring budget amount and an opportunity to advise the contracting parties on the financial terms of the market monitoring contract.

Nevertheless, the Midwest ISO has neither disclosed the budget and financial terms of the Revised Market Monitoring Contract nor requested confidential treatment under Part 388.112 of the Commission's regulations. Rather, the Midwest ISO states in the Market Monitoring Contract that,

An annual budget for the Independent Market Monitoring function shall be prepared by Potomac Economics and submitted to the Market Monitoring Liaison Officer not less than 120 days prior to end of the contract year. This budget will be available for stakeholder review and Board of Director approval through the Midwest ISO budget process.

This proposal is problematic for two reasons. First, it does not comply with the Commission’s May 31 Order. The Midwest ISO must either make public the financial terms of the Market Monitoring Contract or justify keeping those terms confidential under the Commission’s rules. In addition, the May 31 Order requires the Midwest ISO to provide interested parties with an opportunity to review the terms of payment under the contract. The Midwest ISO has not complied with either of these requirements.

Second, although the original market monitoring contract term apparently began on July 6, 2001, transmission customers and public interest representatives have yet to be provided an

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<sup>14</sup> May 31, Order, at p. 61,977, P. 33.

opportunity to review the budget and financial terms of that contract. Yet, the costs of those market monitoring services have been or will be included in the Midwest ISO administrative charge adder that transmission customers pay. Under those circumstances, the Midwest ISO's expenditures under that contract should not be presumed to be prudent.

Furthermore, although the Revised Market Monitoring Contract term began on July 1, 2002, transmission service customers and public interest representatives have not yet had an opportunity to provide input into establishing the overall market monitoring budget allowance or even to review the market monitoring budget for the 2002-2003 contract year. The Market Monitoring Contract specifically states that Potomac Economics will prepare an annual budget and submit it to the Market Monitoring Liaison Officer not less than 120 days prior to end of the contract year. Presumably, the period of July 16, 2001 through June 30, 2002 constitutes a contract year and the period July 1, 2002 through June 30, 2003 constitutes a contract year. Yet, the Midwest ISO provides no evidence that its stated process for market monitoring budget development was followed for either of those contract years. Indeed, the proposed process was not even filed until the first day of the current contract year.

Even if the Midwest ISO's stated process had been followed, the result would still be unsatisfactory because the process does not provide transmission customers and public interest representatives with a role in establishing the budget allowance for market monitoring and the financial terms of the market monitoring prior to the time the contract or contract year becomes effective. An after-the-fact opportunity for review, even if the Midwest ISO decides to provide it, will not be sufficient to ensure that the public interest in proper market monitoring is pursued.

Accordingly, for all these reasons, the ICC recommends that the Midwest ISO's Revised Market Monitoring Contract not be approved. The ICC further recommends that the

Commission direct the development of a market monitoring budget process that provides transmission customers and public interest representatives with an identified role in establishing the budget allowance for market monitoring and the financial terms of the market monitoring prior to the time the contract or contract year becomes effective. Finally, the ICC recommends that the Commission require the annual market monitoring budget to be filed with, and approved by, the Commission. The Commission should use its discretion to review the overall market monitoring budget and financial terms to ensure that the budget: (1) is sufficient to meet the market monitoring needs; (2) is not excessive, as to be unjust or unreasonable; and (3) is established in such a way, and at such a level, as to prevent control of the Market Monitor by any party (including the Midwest ISO) and to permit the Market Monitor to act independently.

## **2. The Data Confidentiality Language is Overly Broad.**

By including data confidentiality presumptions in the Revised Market Monitoring Contract, the Midwest ISO failed to comply with the Commission's directive that the Revised Market Monitoring Contract "provide for little more than the terms of compensation for the IMM and termination provisions." The Revised Market Monitoring Contract states a presumption that confidentiality is warranted for all information gathered by the Market Monitor from either the Midwest ISO or others. Specifically, the Revised Market Monitoring Contract states,

In furtherance of this engagement, the Midwest ISO, participants in the Midwest ISO administered markets, and others will be transmitting information in document or other forms in confidence to you and Potomac Economics. Potomac Economics has agreed to treat all such information as confidential, and to protect it from disclosure in accordance with the provisions of the Midwest ISO Tariff including Attachments S and S-2 thereto, and any applicable codes of conduct or other policies of the Midwest ISO. (Emphasis added).

The Commission's May 31 Order, however, states,

We find that the revised Retention Agreement should provide for little more than the terms of compensation for the IMM and termination provisions, following proper Commission review and approval, as modified above.<sup>15</sup>

The confidentiality language of the Revised Market Monitoring Contract cited above goes well beyond the limited topics the Commission found to be appropriate to be included in the Market Monitoring Contract, and should, therefore, be rejected.

In addition to this technical reason for rejecting the data confidentiality language, the confidentiality contract provision cited above should be rejected because the presumption of confidentiality for all information collected by the Market Monitor is not warranted. Indeed, the Market Monitor will likely be collecting much information, both from the Midwest ISO and from other parties, that is not confidential. If the Market Monitor is required, nonetheless, to treat non-confidential information as if it were confidential, the ability of the Market Monitor to issue thorough reports could be made more difficult.

The Market Monitoring Plan addresses the treatment of confidential information. Including confidentiality language in the Market Monitoring Contract: (1) violates the Commission's May 31 directives concerning Market Monitoring Contract contents; (2) creates a false presumption that could hinder Market Monitor reporting; and (3) sets up potential conflicts with the confidentiality language in the Market Monitoring Plan. The ICC recommends, therefore, that the data confidentiality paragraph of the Revised Market Monitoring Contract set forth above be deleted.

**B. The Midwest ISO's Market Monitoring Plan Fails to Ensure that the Market Monitor Will Act Independently of the Midwest ISO**

**1. Corrections to the Market Monitoring Plan Framework are Required to Achieve Independence**

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<sup>15</sup> May 31 Order, at p. 61,977, P.32.

The ICC continues to believe that the institutional framework for market monitoring in the Midwest is fundamentally flawed as described in the ICC's November 19 Comments. As the ICC explained therein, it is not reasonable to expect the Market Monitor to be independent of the Midwest ISO if the Market Monitor: (1) is selected by the Midwest ISO; (2) contracts with the Midwest ISO; (3) has its budget set by the Midwest ISO; (4) has the terms of payment controlled by the Midwest ISO; (5) has its invoices paid by the Midwest ISO; (6) reports to the Midwest ISO; (7) advises the Midwest ISO; (8) testifies on behalf of the Midwest ISO; and (9) has its re-appointment as the Market Monitor in subsequent periods subject to the pleasure of the Midwest ISO. The Market Monitor cannot reasonably be expected to act independently of the Midwest ISO as long as it is a contract agent of the Midwest ISO. For these reasons, the ICC proposed that the Market Monitor be established as a contract agent of the Commission, rather than as a contract agent of the Midwest ISO.<sup>16</sup>

The Midwest ISO developed its Revised Market Monitoring Plan under the flawed market monitoring framework. Not surprisingly, the Plan is similarly flawed. The Commission must address this fundamental flaw in its developing market monitoring framework and then direct that the Revised Midwest Market Monitoring Plan be modified accordingly.

## **2. Additional Specific Changes to the Market Monitoring Plan are Required**

Specific changes to the Midwest Market Monitoring Plan are required regardless of whether or not the Commission corrects the institutional flaws in the framework for market monitoring described above.

### **a. Modifications to improve the independence of the Market Monitor from the Midwest ISO under the existing framework**

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<sup>16</sup> See, ICC November 19 Comments, at 13-14.

The following modifications to the Revised Market Monitoring Plan are required to improve the independence of the Market Monitor from the Midwest ISO under the current framework:

**Subsection 4.3(1):**

Delete the words “Advise the Midwest ISO, and shall prepare” and replace them with “Prepare” in Subsection 4.3(1) as follows.

- (1) ~~Advise the Midwest ISO, and shall prepare~~ Prepare and submit to FERC the reports specified herein, on the nature and extent of, and any impediments to, competition in and the economic efficiency of the Midwest ISO’s Markets and Services;

The Market Monitor should not be put in the position of working for the Midwest ISO, i.e., advising the Midwest ISO. The Midwest ISO cannot always be expected to act on behalf of the public interest—the Midwest ISO has its own private interests to advance. Thus, the Midwest ISO should have its own separate staff to advance its interests. It should not rely on the Market Monitor in that regard. The Market Monitor should be expected, at all times, to act on behalf of the public interest and the Market Monitoring framework should be redesigned to support that result.

**Subsection 4.3(3):**

Delete the words “to the Midwest ISO” so that Subsection 4.3(3) reads:

- (3) ~~Recommend to the Midwest ISO~~ modifications to market rules, tariffs, or other corrective actions to improve the competitiveness or efficiency of the Midwest ISO’s Markets and Services;

This subsection should be modified for the same reasons as explained for the modification to subsection 4.3(1). The Market Monitor should not be put in the position of working for the Midwest ISO, i.e., making recommendations to the Midwest ISO. Rather, it

should maintain appropriate arms-length oversight and report findings and recommendations directly to FERC

**Subsection 4.3(4):**

Delete the words “to the Midwest ISO” so that Subsection 4.3(4) reads:

- (4) Recommend ~~to the Midwest ISO~~ modifications to market rules or tariffs to improve the compatibility of, and the efficiency of trading between, the Midwest ISO and neighboring RTOs or control areas; and

This subsection should be modified for the same reasons as explained for the modification to subsection 4.3(1). The market monitor should report directly to FERC rather than work for the Midwest ISO.

**b. State Commissions Must Have Proper Access to Market Monitor Information**

The following modifications must be made to the Revised Market Monitor Plan in order for state commissions to have proper access to market monitor information:

**Section 6.1:**

Insert the following language at the end of the first sentence in Section 6.1 so that it reads:

For purposes of carrying out its responsibilities under this Plan, the IMM shall have access to data or other information gathered or generated by the Midwest ISO in the course of its operations or otherwise in the possession of the Midwest ISO, or that the Midwest ISO is reasonably able to generate, produce, or acquire. In addition, the Midwest ISO shall gather from market participants all data and information that the Midwest ISO is authorized to gather to the extent a request for such information is submitted to the Midwest ISO by the IMM.

First, it is overly restrictive to limit the class of data that the IMM may receive from the Midwest ISO to that which is “gathered or generated” by the Midwest ISO “in the normal course of its operations.” Rather, the IMM should have access to any needed information that is in the

possession of the Midwest ISO, regardless of whether the Midwest ISO came into possession of that information through “the normal course of its operations.”

Second, it is reasonable for the IMM to expect the Midwest ISO to expend some reasonable amount of effort to generate, produce, or acquire data and information needed by the IMM.

Third, the IMM should be able to use the Midwest ISO as its data collection agent for obtaining data from market participants, to the extent that the RTO is authorized to collect the data from the market participants. This additional provision is very important given the barriers set up by Section 6.2 of the Plan to block the IMM from obtaining data and information directly from market participants.

#### **Subsection 6.2.1:**

Insert at the end of the last sentence, “, in cases where a confidentiality agreement applies” so that Subsection 6.2.1 reads as follows:

If the IMM determines that additional data or other information is required to accomplish the objectives of the Plan, the IMM may request the persons or entities possessing, having access to, or having the ability to generate or produce such data or other information to furnish it to the IMM. Any such request shall be accompanied by an explanation of the need for such data or other information, a specification of the form or format in which the data is to be produced, and an acknowledgment of the obligation of the IMM to maintain the confidentiality of the data, in cases where a confidentiality agreement applies.

Subsection 6.2.1, as written in the Plan, reflects an implicit assumption that all information the IMM receives from market participants requires confidential treatment. Such a presumption is unwarranted, is restrictive to the function of market monitoring, and should be removed.

#### **Section 6.3:**



Section 6.3 should be modified as follows:

The IMM shall provide data and information upon request to the FERC. Upon request for data or information that the IMM received from the Midwest ISO by a State regulatory agency, the IMM shall provide the data or information ~~consistent with the information policy of the Midwest ISO~~. Upon request from a State Regulatory Agency for confidential data or information that the IMM received from a Market Participant, the IMM shall ~~promptly notify the Market Participant that provided the data and shall not release the confidential data or information without prior written consent from the Market Participant~~ provide such data and information upon receipt of a signed protective order or other procedure for protecting confidential data.

First, State regulatory agencies must have unrestricted access to all data and information that the IMM gathers from the Midwest ISO. It should not be presumed that data and information gathered by the IMM from the Midwest ISO requires confidential treatment. The reference in Section 6.3 to “the information policy of the Midwest ISO” is inappropriate and should be deleted. Furthermore, if reference to an “information policy” is retained, the applicable information policy must be incorporated into the Plan and not remain as an unidentified outside document.

Second, it is improper and contradictory for Section 6.3 to give a market participant veto authority over the data and information that the IMM may provide to a state regulatory agency. The last sentence of Section 6.4 provides that State regulatory authorities may obtain from the IMM a market participant’s confidential data and information pursuant to a protective order or other procedure. State commissions routinely use these types of mechanisms and procedures to protect confidential data and information. The reference in Section 6.4 to “a protective order or other procedure” is acceptable to the ICC and should be included in Section 6.3 as well. As Section 6.3 is proposed by the Midwest ISO, it improperly holds state commissions hostage to the whims of market participants. Furthermore, unless it is modified, Section 6.3 contradicts the provisions of Section 6.4.

#### **Section 6.4:**

Section 6.4 should be modified as follows:

The IMM shall use all reasonable procedures necessary to protect and preserve the confidentiality of all information obtained in connection with the implementation of this Plan. Confidential information shall include data or information that is proprietary, commercially valuable or competitively sensitive, or is a trade secret and that has been designated as confidential by a Market Participant, provided that such information is not available from public sources, or is not otherwise subject to disclosure under any tariff or agreement administered by the Midwest ISO. Except as may be required by subpoena or other compulsory process, or as otherwise provided for herein, the IMM shall not disclose confidential information to any person or entity without prior written consent. Upon receipt of a subpoena or other compulsory process for the disclosure of confidential information, the IMM shall promptly notify the party that provided the data and shall provide all reasonable assistance requested by the party to prevent disclosure, and if possible under the terms of the subpoena or other compulsory process shall not release the data until the party provides written consent or until the party's legal avenues are exhausted. The confidentiality of data and information provided to Interested Government Agencies will be maintained with a protective order or other procedures of the agency for protecting confidential data.

Government agencies, such as state commissions, must be accorded special access to data and information in order to perform their public interest responsibilities. Section 6.3 recognizes the special responsibility of the Commission by stating, "The IMM shall provide data and information upon request to the FERC." State commissions should be accorded this same level of access, with confidential information being protected with "a protective order or other procedures of the agency for protecting confidential data." As proposed by the Midwest ISO, Sections 6.3 and 6.4 of the Plan, taken together, make access to needed data and information by state commissions subject to the whims of market participants. Accordingly, Sections 6.3 and 6.4 must be revised as proposed by the ICC.

#### **Addendum A:**

The title of Addendum A should be modified to insert the word “Routinely” between “May” and “Request” as follows:

**LIST OF DATA THE IMM MAY ROUTINELY REQUEST FROM MARKET PARTICIPANTS**

This modification of the title is appropriate to reflect the characterization in Section 6.2.2(b) of the Addendum A data as “routine provision.” Similarly, Section 6.5 states that the IMM shall “regularly collect” data and information necessary to implement the Plan.

The first paragraph in Addendum A should be modified to correct the incorrect reference to Section 6.2.2. The correct reference is to Section 6.2.2(a)(i) as follows:

The following data or information may be obtained by the IMM from Market Participants, transmission owners, or the Midwest ISO in accordance with § 6.2.2(a)(i) of the Market Monitoring Plan. Market Participants, transmission owners, or the Midwest ISO shall retain the following categories of data or information for at least two years, beginning with the date of initial operation.

The information that the IMM is authorized to obtain from market participants is not limited only to the information categories described in Addendum A. Indeed, Section 6.2.2(a)(i) specifies that the information described on Addendum A is that which the IMM may routinely request from market participants. Section 6.2.2(a)(ii) specifies that the IMM may request additional information from market participants when such information is “reasonably necessary to achieve the purposes or objectives of this Plan . . .”. Therefore, reference in the first paragraph of Addendum A to “Section 6.2.2” is incorrect and could, unfortunately, have the effect of limiting the data and information that the IMM may request from market participants. This reference must be modified as proposed by the ICC.

**c. The Market Monitoring Plan Must Be Properly Inclusive of the New Transmission Entities**

The following modifications to the Revised Market Monitoring Plan are required for it to be properly inclusive of the new transmission entities:

### **Section 1.3**

Section 1.3 should be modified to include transmission owners and independent transmission companies as follows:

#### **1.3 Persons and Entities Subject to the Plan**

The Midwest ISO, the IMM, transmission owners, independent transmission companies, and any person or entity participating in any of the Midwest ISO's markets or that takes service under or is a party to any tariff or agreement administered by the Midwest ISO, shall be subject to the terms, conditions and obligations of this Plan.

Although transmission owners and independent transmission companies may not be market participants according to the definition in Section 2.2, they may, nevertheless, significantly affect market conditions within the area to be monitored by the IMM, and should, therefore, be subject to the Plan.

### **Section 6.2:**

The title to Section 6.2 should be expanded to include transmission owners and independent transmission companies as follows.

#### **6.2 Data from Market Participants, Transmission Owners, and Independent Transmission Companies**

Although transmission owners and independent transmission companies may not be market participants according to the definition in Section 2.2, they may, nevertheless significantly affect market conditions within the area to be monitored by the IMM. This change will also make Section 6.2 consistent with the introductory language in Addendum A.

### **Addendum A:**

The first paragraph in Addendum A should be modified as follows:

The following data or information may be obtained by the IMM from Market Participants, transmission owners, independent transmission companies, or the Midwest ISO in accordance with § 6.2.2(a)(i) of the Market Monitoring Plan. Market Participants, transmission owners, independent transmission companies, or the Midwest ISO shall retain the following categories of data or information for at least two years, beginning with the date of initial operation.

There should be no uncertainty as to whether independent transmission companies are subject to the requirements of Addendum A. Addendum A stems from the provisions of Section 6.2.1 of the Plan that provides that, “If the IMM determines that additional data or other information is required to accomplish the objectives of the Plan, the IMM may request the persons or entities possessing, having access to, or having the ability to generate or produce such data or other information to furnish it to the IMM.” Clearly, independent transmission companies, as they are evolving, are “entities” having data that may be needed by the IMM. Addendum A should make this obligation clear by including reference to these entities.

#### **IV. CONCLUSION**

Wherefore, for the reasons explained above, the ICC requests that the Commission not approve the Midwest ISO’s request for approval of the Revised Market Monitoring Contract and direct further revisions to the Revised Market Monitoring Plan, as recommended above.

With respect to the Revised Market Monitoring Contract, the Midwest ISO should be directed either to disclose the Contract’s budget and financial terms or to request confidential treatment under Part 388.112 of the Commission's regulations. The Midwest ISO should also be directed to provide “interested parties” with an opportunity to review the “terms of payment” in order to satisfy themselves that “payment cannot result in inappropriate incentives to find in favor of the RTO.” In order for this review and advice process to have meaning, it must take place prior to the beginning of the market monitoring contract period. Additionally, the Commission should require the Midwest ISO to file the market monitoring budget for

Commission review. Finally, the amounts spent by the Midwest ISO for the 2001-2002 market monitoring contract budget year must be examined carefully because the budget for Midwest market monitoring was established under a faulty procedure as described above.

Regarding the Market Monitoring Plan, the ICC continues to urge the Commission to modify the institutional framework for market monitoring to ensure the independence of the market monitor. Specifically, the ICC recommends that the Market Monitor be established as a contract agent of the Commission, rather than of the Midwest ISO. The ICC believes that as long as the Market Monitor remains a contract agent of the Midwest ISO, it is unreasonable to expect it to be independent of Midwest ISO influence.

In addition, if the Commission retains the existing institutional framework for market monitoring, the ICC recommends that the Commission modify specific provisions in the Midwest ISO's Market Monitoring Plan to: (1) improve the independence of the market monitor; (2) afford state commissions proper access to needed market monitor information; and (3) ensure that the Market Monitoring Plan is properly inclusive of the new transmission entities.

Respectfully Submitted,

/s/ Christine F. Ericson

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July 24, 2002

## **CERTIFICATE OF SERVICE**

I hereby certify that I caused copies of the foregoing document of the Illinois Commerce Commission to be served this day upon each person designated on the official service list compiled by the Secretary in this proceeding, a copy of which is attached, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Chicago, Illinois, this 24th day of July, 2002.

/s/ Christine F. Ericson

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